

Fitzhugh
Signature of Sponsor

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Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2264

House Bill No. 2286*

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 62, Chapter 5, is amended by deleting Part 4 in its entirety and substituting instead Sections 2 through 18 of this act.

SECTION 2. This part shall be known and may be cited as the "Tennessee Prepaid Funeral Benefits Act".

SECTION 3. This act governs the qualifications and procedures for registration and general regulatory requirements for the sale of prepaid funeral benefits in this state.

SECTION 4. As used in this act, unless the context requires otherwise:

(1) "Cash advance item" means any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to: sales tax, certified copies of death certificates; clergy honoraria; flowers; musicians or singers; obituary notices; and gratuities.

(2) "Commissioner" means the commissioner of commerce and insurance or the commissioner's designee;

(3) "Department" means the department of commerce and insurance;

(4) "Guaranteed preneed funeral contract" means the preneed seller, where the contract has been funded in accordance with its terms, shall furnish at the time of death of the contract beneficiary, at no additional charge to the next of kin, the estate of the deceased, or other individual or entity responsible for the funeral, the merchandise and services selected (or the equivalent if the specific merchandise is not readily available) in the preneed funeral contract. The only adjustment in the charge to the next of kin, the estate of the deceased or other individual or entity responsible for the funeral, shall be for cash advance items. The preneed seller shall be obligated to deliver the agreed upon merchandise and services under a fully funded preneed funeral contract for the

available funding at the time of death of the contract beneficiary. Nothing in this section shall be construed to prohibit the preneed seller from receiving the available funding up to the seller's current retail price for the merchandise and services at the time of death of the contract beneficiary;

(5) "Insurance company" means any corporation, limited liability company, association, partnership, society, order, individual or aggregation of individuals engaging in or proposing or attempting to engage as principals in any kind of insurance business, including the exchanging of reciprocal contracts between individuals, partnerships, and corporations;

(6) "Non-guaranteed preneed funeral contract" means in addition to any cash advance items, the preneed seller may charge the individual or entity responsible for the funeral any difference between the available funding and seller's current retail price at the time of death of the contract beneficiary for the merchandise and services selected in the preneed funeral contract;

(7) "Prearrangement insurance policy" means a life insurance policy, annuity contract, or other insurance contract, or any series of contracts or agreements in any form or manner, issued by an insurance company, which, whether by assignment or otherwise, funds a preneed funeral contract, the insured or annuitant being the person for whose funeral service the funds were paid;

(8) "Preneed funeral contract" means any contract, whether funded by a preneed funeral trust or prearrangement insurance policies, or any combination thereof, intended to furnish or perform:

(A) Funeral services;

(B) Personal property or merchandise; or

(C) Services of any nature in connection with the final disposition of a dead human body.

Preneed funeral contract does not mean the furnishing of cemetery merchandise and services otherwise regulated under title 46, chapter 1, part 2;

(9) "Preneed funeral contract beneficiary" means the person upon whose death the preneed funeral contract will be performed. This person may also be the purchaser of the preneed funeral contract;

(10) "Preneed funeral funds" means all payments of cash, or its equivalent, made to a preneed seller or preneed sales agent upon any preneed funeral contract;

(11) "Preneed funeral trust" means funds set aside in a trust account held by a trustee to provide for a preneed funeral contract;

(12) "Preneed sales agent" means an individual who has applied for and has been granted a registration to sell preneed funeral contracts on behalf of a preneed seller pursuant to this part;

(13) "Preneed seller" means a funeral establishment or other individual, firm, partnership, company, corporation, or association that has applied for and has been granted a registration to sell preneed funeral contracts pursuant to this part;

(14) "Trustee" means a state or national bank or federally chartered savings and loan association, or state chartered trust company, or, in the reasonable discretion of the commissioner upon the terms and conditions that commissioner may require, a securities brokerage firm licensed and in good standing with appropriate state and federal regulatory authorities.

SECTION 5.

(a) No individual may offer or sell preneed funeral contracts without first registering with the commissioner as a preneed sales agent. No individual may sell, solicit or negotiate prearrangement insurance policies without first registering with the commissioner as a preneed sales agent and obtaining an insurance producer license pursuant to title 56, chapter 6, part 1.

(b) No funeral establishment or other individual, firm, partnership, company, corporation, or association may offer or sell preneed funeral contracts without first registering with the commissioner as a preneed seller. A funeral establishment or other individual, firm, partnership, company, corporation, or association with more than one

physical location in this state shall obtain a separate registration for each physical location where it acts as a preneed seller.

SECTION 6.

(a) In order to obtain a preneed seller registration or a preneed sales agent registration an individual, funeral establishment or other individual, firm, partnership, company, corporation, or association must:

(1) File an application with the department on a form prescribed by the commissioner; and

(2) Pay a nonrefundable filing fee in an amount set by the commissioner.

(b) A preneed seller registration shall be valid only at the address provided in the application or at a new address approved by the commissioner.

(c) All registrations issued under this part shall be valid for two (2) years.

(d) All registrations become invalid unless renewed.

(e) The commissioner shall send a renewal notice and the renewal of a registration may be effected at any time during the two (2) months preceding the date of expiration upon submission of an application to the commissioner on the prescribed form, accompanied by a renewal fee as set by the commissioner.

SECTION 7.

(a) No preneed funeral contract shall be offered in this state until a copy of the contract has been filed with and approved by the commissioner. If the commissioner does not disapprove the contract within sixty (60) days after receipt of the request for approval, the contract will be deemed approved.

(b) Each preneed contract form shall:

(1) Be written in clear and understandable language printed in an easy-to-read type size and style;

(2) Contain space to include the name, address, telephone number, and registration number of the preneed seller obligated to provide the services under

the contract terms, and all such information must be completed before the contract is signed by the purchaser;

(3) Clearly identify whether the contract is a guaranteed preneed funeral contract or a non-guaranteed preneed funeral contract; and

(4) If the contract is funded by a preneed funeral trust, the preneed funeral contract shall state whether the preneed funeral trust it establishes is revocable or irrevocable.

(A) If the preneed funeral trust is irrevocable, the preneed funeral contract shall state on its face and in bold type the following words: THE PRENEED FUNERAL TRUST ACCOUNT ESTABLISHED BY THIS CONTRACT IS IRREVOCABLE, AND THE FUNDS PAID HEREUNDER ARE NOT REFUNDABLE. ACCUMULATED TRUST PRINCIPAL AND INTEREST ARE FREELY TRANSFERABLE TO SATISFY FUNERAL EXPENSES AT ANY LICENSED FUNERAL ESTABLISHMENT AS PROVIDED BY LAW.

(B) If such preneed funeral trust is revocable, the purchaser of the merchandise or services under the agreement, contract or plan shall be entitled to receive any or all of the payments made and any earnings or interest thereon, less any applicable fees and expenses permitted by this act, upon demand in writing on the preneed seller and the trustee. Absent gross negligence or willful misconduct by the trustee, payment by the trustee of the amount held in trust, less any applicable fees and expenses permitted by this act, shall relieve the trustee of further liability to the purchaser in connection with the trust.

(c) No modification of the form, terms, or conditions of the preneed contract may be made without the prior written approval of the commissioner.

(d) No preneed funeral contract shall provide for the funeral establishment, preneed seller, or preneed sales agent to receive any benefits from a prearrangement

insurance policy or monies from a preneed funeral trust other than the amount of payment for the merchandise and services provided by the funeral establishment. This subsection shall not prohibit the payment of commissions authorized to be paid under title 56, chapter 6.

(e) The provisions of this section shall apply only to preneed funeral contracts executed subsequent to January 1, 2008.

SECTION 8.

(a) Every preneed seller engaged in the business of selling preneed funeral contracts funded by trust shall establish a preneed funeral trust fund. Such trust fund shall be established by executing a written trust agreement with a trustee as defined herein; provided that a preneed seller may change the trustee of its trust fund by providing written notice to the commissioner no later than thirty (30) days prior to the change along with evidence sufficient to the commissioner that the trustee will be able to comply with the requirements of this act. If the commissioner determines that the evidence submitted is insufficient to ensure that the trustee will be able to comply with the requirements of this act, the commissioner may refuse to allow the preneed seller to change the trustee. If the commissioner does not object to the change of trustee within sixty (60) calendar days of receiving a request, the current trustee shall have not less than ninety (90) calendar days from the date it receives notice of the proposed change to transfer all trust assets held by the trustee to the successor trustee.

(b) If the preneed funeral contract purchaser chooses to fund the preneed funeral contract by a trust deposit or deposits, the preneed seller shall deposit all funds with the trustee, to be held in trust, within fifteen (15) calendar days of receipt. The preneed seller, at the time of making the deposit, shall furnish to the trustee the name of each preneed funeral contract beneficiary and the amount of payment on each for which the deposit is being made. The trustee may establish a separate trust fund for each preneed funeral contract or a single trust fund for all preneed funeral contracts issued by a preneed seller. The trust accounts shall be carried in the name of the preneed seller,

but accounting records shall be established and maintained for each individual preneed funeral contract beneficiary showing the amounts deposited and invested, and interest, dividends, increases, and accretions earned.

(c) Funds deposited in trust under a preneed funeral contract may, with the written permission of the preneed funeral contract purchaser and written approval of the commissioner, be withdrawn by the trustee and used to purchase a prearrangement insurance policy. The trustee shall disclose, in writing, the terms of the prearrangement insurance policy to the preneed funeral contract purchaser. Except as provided in this subsection, no funds deposited in trust with a trustee pursuant to this section shall be withdrawn by the trustee to purchase a prearrangement insurance policy.

(d) No preneed seller, affiliate of a preneed seller, or any person directly or indirectly engaged in the burial, funeral home, or cemetery business may act as trustee for any preneed funeral trust. No preneed seller, an affiliate of a preneed seller, or any person directly or indirectly engaged in the burial, funeral home, or cemetery business may share in the responsibilities of or direct the actions of the trustee of a preneed funeral trust fund.

(e) It is unlawful to loan preneed funeral trust funds to a preneed seller, an affiliate of a preneed seller, or any person directly or indirectly engaged in the burial, funeral home, or cemetery business. Furthermore, the preneed seller's interest in the trust shall not be pledged as collateral for any loans, debts, or liabilities of the preneed seller and shall not be transferred to any person without the prior written approval from the commissioner and the trustee.

SECTION 9.

(a) Monies held in a preneed funeral contract trust shall be held in trust, both as to principal and income earned thereon, and shall remain intact, except that the trustee shall have the right to use trust fund income to pay applicable taxes and reasonable expenses related to the administration of the trust, including reasonable trustee's fees for services rendered pursuant to the terms of the applicable trust agreement or to

others for the preparation of fiduciary tax returns. In no event shall the principal be diminished.

(b) The preneed seller shall be liable to the trustee and to third parties to the extent that income from the trust is not sufficient to pay the expenses of the trust.

(c) The trustee shall make regular valuations of assets it holds in trust and provide a report of such valuations to the preneed seller at least annually.

(d) The trustee shall:

(1) Invest at least fifty percent (50%) of the monies paid and placed in a preneed funeral contract trust after the effective date of this act in the following:

(A) Demand deposits;

(B) Savings accounts;

(C) Certificates of deposits; or

(D) Other accounts issued by financial institutions if the amounts deposited in those accounts are fully covered by federal deposit insurance.

(2) For all investments, invest as prescribed in this section and in so investing, such trustee shall exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

(e) Except as otherwise provided by this act, all payments made by the purchaser of a preneed funeral contract shall remain trust funds with a trustee or as paid insurance premiums with an insurance company, as the case may be, until the death of the preneed funeral contract beneficiary and until full performance of the preneed funeral contract.

SECTION 10.

(a) If the preneed funeral contract purchaser chooses to fund the contract by a prearrangement insurance policy, the enrollment or application form for the prearrangement insurance policy or certificate shall be submitted to the insurance company by the preneed sales agent within fifteen (15) calendar days of receipt.

(b) It is unlawful for any life insurance company, fraternal benefit society or other similar company, association or society issuing prearrangement insurance policies, by whatever name they may be called, upon the lives of citizens of this state, to:

(1) Designate in the policy or otherwise the person, firm or corporation to conduct the funeral of the insured, or to organize, promote or operate any enterprise or plan, or to enter into any contract with such insured or with any other person, which plan or contract tends to limit or restrict the freedom of choice in the open market of the person or persons having the legal right of such choice regarding contracts, purchases and arrangements with reference to any part of a funeral service for such insured. Irrevocable assignments of policy benefits to a funeral establishment are expressly prohibited and no insurance company shall assist in the irrevocable assignment of such benefits;

(2) Provide in the policy or otherwise that the face amount thereof, or any loss or indemnity, which may accrue there under, shall be payable in anything other than legal tender of the United States and of this state to the beneficiary named therein or the legal representative of such insured, and any provision to the contrary shall be null and void;

(3) Enter into any contract with any funeral director, providing that such funeral director shall conduct the funeral of persons insured by such insurance company, fraternal benefit society, or similar company. This subsection shall not be construed to prohibit any beneficiary under a policy from assigning such policy to a funeral establishment of the beneficiary's choice after death of the insured has occurred and liability has accrued;

(4) Enter into any contract with any citizens of this state, contracting and agreeing to furnish funeral merchandise or services upon the death of any person insured;

(5) Enter into any contract, conditioned to take effect on the death of any person, wherein such person, or the personal representative, heirs or next of kin of such person, is promised any rebate, discount or reduction in price for or on account of funeral merchandise, expenses or services by virtue of such person being issued such policy or certificate, or being designated as beneficiary therein, or by virtue of such person entering into such contract or being designated therein as the recipient of any such rebate, discount or reduction in price.

(c) Nothing in subsection (b) shall be construed to prohibit the irrevocable assignment of policy benefits to a trust set up to allow for the distribution of the benefits to the funeral home of the policyholder's choosing.

(d) No assignment of the rights or benefits under a prearrangement insurance policy shall be valid unless it is done on a form approved by the commissioner.

(e) In addition to any other penalties or remedies provided by law, the commissioner, or any person damaged or who is threatened with loss or damage, by reason of a violation of this section may maintain a suit in any court of equitable jurisdiction having jurisdiction over the parties, for injunctive relief against such violations, and such courts shall have the power to grant such relief.

SECTION 11.

(a) Upon the death of the contract beneficiary, the trustee or the insurance company shall pay the funeral establishment or other provider which furnished the services or merchandise only after they have been furnished with a certified copy of the death certificate of such person, or other proof of death acceptable to the trustee or insurance company together with a copy of the statement of funeral merchandise and services, signed by the funeral director or other provider and representative of the contract beneficiary, setting forth that all of the terms and conditions of such preneed

funeral contract have been fully performed by the funeral establishment or other provider.

(b) After payment for the merchandise and services as set forth in the preneed funeral contract, the trustee or insurance company shall pay any balance remaining in the preneed funeral trust fund or the prearrangement insurance policy to the purchaser, the purchaser's estate or otherwise named beneficiary.

SECTION 12.

(a) Every preneed seller shall keep and maintain, at a minimum, accurate accounts, books, and records in this state of all preneed funeral contract and prearrangement insurance policy transactions, copies of all agreements, insurance policies, instruments of assignment, the dates and amounts of payments made and accepted thereon, the names and addresses of the preneed funeral contract purchasers, the names and addresses of the preneed funeral contract beneficiaries, the names of the trustees holding preneed funeral trust funds, copies of the trustee's regular valuations of assets required herein, and the names of insurance companies issuing prearrangement insurance policies. Such records shall be kept for a minimum of five (5) years after the death of the preneed funeral contract beneficiary.

(b) The commissioner may investigate or examine the affairs of any preneed seller or preneed sales agent whenever it is deemed appropriate to do so. However, the commissioner shall require an annual examination to ensure that each person, firm, or corporation promising to pay or arrange for funeral services under this act will be able to perform its contract with the purchaser.

(c) The preneed seller shall pay all costs of any examination conducted under subsection (b), including, but not limited to, the reasonable fees of actuaries, accountants, attorneys and other professionals with whom the commissioner may enter into a contract to perform examination services on behalf of the commissioner.

(d) Trustees of preneed funeral trusts shall disclose to the commissioner any information regarding preneed funeral trust accounts overseen by the trustee.

SECTION 13. A preneed seller registration may be transferred to a new owner upon payment of a fee fixed by the commissioner and upon submission of an audit report prepared and signed by an independent certified public accountant licensed in Tennessee. All such fees and expenses in connection with the audit are not the responsibility of the trustee or the trust. The audit report shall include an unqualified opinion on the accuracy of the trust fund balances and a report of compliance with the provisions of this part. Shortages in the trust funds shall be funded by the preneed seller or new owner prior to a transfer of registration.

SECTION 14.

(a) The commissioner of commerce and insurance shall administer the provisions of this act.

(b) The commissioner shall promulgate rules and regulations to effectuate the intent of this part in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(c) The commissioner shall collect a fee for the registration of any person, association, partnership, firm or corporation engaged in selling any agreement, contract or plan permitted under this act.

(d) The commissioner may deny an application for a registration, or may suspend, revoke, or refuse to issue or renew any registration hereunder upon finding that the registrant or applicant has:

- (1) Violated any provision of this act, or any rule promulgated hereunder;
- (2) Practiced fraud, deceit or misrepresentation;
- (3) Knowingly and willfully made a material misstatement in connection with an application for registration;
- (4) Been convicted by a court of competent jurisdiction of any felony, if the commissioner finds that such conviction reflects unfavorably on the fitness for such registration;
- (5) Engaged in dishonorable, unethical, or unprofessional conduct of a character likely to defraud, deceive or harm the public;

(6) Violated any disciplinary order of the commissioner; or

(7) Failed or refused to cooperate with any audit, inspection or investigation to determine compliance with this act or rules and regulations promulgated pursuant thereto;

(e) In addition to or in lieu of any lawful disciplinary action under this act, the commissioner may, at the commissioner's discretion, assess civil penalties in an amount not to exceed one thousand dollars (\$1,000) for each separate violation of any provision of this act, or any rule or regulation promulgated hereunder. Each day of continued violation constitutes a separate violation.

(f) The commissioner is authorized to assess a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against the trustee of a preneed trust fund required by this act, for each separate violation of this act, or of any rule or regulation promulgated hereunder. Each day of continued violation constitutes a separate violation.

SECTION 15.

(a) The Davidson County chancery court, upon the petition of the commissioner, may appoint the commissioner as receiver to take charge of, control and manage a preneed seller upon one (1) or more of the following grounds:

(1) The preneed seller has not maintained trust funds received from contracts in the manner required by this part;

(2) The preneed seller has allowed its registration to lapse, or the registration has been revoked;

(3) The preneed seller is impaired or insolvent;

(4) The preneed seller has refused to submit its books, records, accounts, or affairs to examination by the commissioner;

(5) There is reasonable cause to believe that there has been embezzlement, misappropriation, or other wrongful misapplication or use of trust

funds or fraud affecting the ability of the preneed seller to perform its obligations under preneed funeral contracts sold or assumed by the preneed seller;

(6) The preneed seller has failed to file its annual report; or

(7) The preneed seller cannot or will not be able to meet all of its contractual obligations when they come due.

(b) For the purpose of this section, Davidson County chancery court shall have exclusive jurisdiction over matters brought hereunder, and any such court is authorized to make all necessary or appropriate orders to carry out the purposes of this part.

(c) Receivership proceedings instituted pursuant to this chapter shall constitute the sole and exclusive method of liquidating, rehabilitating, or conserving a preneed seller, and no court shall entertain a petition for the commencement of such proceedings unless the petition has been filed in the name of the state on the relation of the commissioner.

(1) The commissioner shall commence any such proceeding by application to the court for an order directing the preneed seller to show cause why the commissioner should not have the relief prayed for in the application.

(2) On the return of the order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the prepaid contracts purchaser, contract beneficiaries, or the public may require.

(d) The commissioner may appoint one (1) or more special deputies, who have all the powers and responsibilities of the receiver granted under this section and the commissioner may employ such counsel, clerks and assistants as deemed necessary. The compensation of the special deputy, counsel, clerks and assistants, and all expenses of taking possession of the preneed seller and of conducting the proceedings, shall be fixed by the commissioner, with the approval of the Davidson County chancery court, and shall be paid out of the funds or assets of the preneed seller. The persons appointed under this section shall serve at the pleasure of the commissioner.

(e) The receiver may take such action as the receiver deems necessary or appropriate to reform and revitalize the preneed seller. The receiver has all the powers of the owners and directors, whose authority shall be suspended, except as they are redelegated by the receiver. The receiver has full power to direct and manage, to hire and discharge any employees subject to any contractual rights they may have, and to deal with the property and business of the preneed seller.

(f) If it appears to the receiver that there has been criminal or tortious conduct, or breach of any contractual or fiduciary obligation detrimental to the preneed seller by any owner, officer, director or other person, the receiver may pursue all appropriate legal remedies on behalf of the preneed seller.

(g) If the receiver determines that reorganization, consolidation, conversion, merger or other transformation of the preneed seller is appropriate, the receiver shall prepare a plan to effect such changes. Upon application of the receiver for approval of the plan, and after such notice and hearings as the Davidson County chancery court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. Any plan approved under this section shall be, in the judgment of the court, fair and equitable to all parties concerned. If the plan is approved, the receiver shall carry out the plan.

(h) There is hereby established within the general fund a preneed funeral consumer protection account, hereinafter the "preneed funeral account." All funds received by the commissioner under this section shall be deposited into the account and held solely for the purpose for this section.

(i) Moneys within the account shall be invested by the state treasurer in accordance with the provisions of § 9-4-603 for the sole benefit of the account.

(j) No preneed registration renewal shall be issued unless the applicant pays, in addition to the renewal fee, a preneed funeral consumer protection fee of twenty dollars (\$20.00) for every preneed funeral sales contract entered into during the preceding renewal period.

(k) The funds received pursuant to this section shall be used to fund the preneed registration program and any receivership action initiated by the commissioner against a preneed seller to the extent the funds or assets of the preneed seller are not adequate to fund the receivership.

(l) There shall be no liability on the part of, and no cause of action of any nature shall arise against, the commissioner or the department or its employees or agents for any action taken by them in the performance of their power and duties under this section.

SECTION 16. A violation of this act is a Class C misdemeanor.

SECTION 17. In addition to other remedies, an action of injunction may be brought and maintained by the state of Tennessee or any other interested party to enjoin the violation of this act.

SECTION 18. In civil actions, in which the prevailing party proves fraud relative to a contract for future services under this part, such prevailing party shall receive treble damages together with attorneys' fees, costs, and interest.

SECTION 19. Tennessee Code Annotated, Title 56, Chapter 34, is repealed.

SECTION 20. This act shall take effect immediately upon becoming law for the purposes of rulemaking and shall take effect on January 1, 2008 for all other purposes, the public welfare requiring it.